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U. S.
FILED
DEC 29 1943
CHARLES ELMORE CROPLEY
CLERK.

Supreme Court of the United States

OCTOBER TERM, 1943.

No. 563

EMPIRE TRUST COMPANY, as Trustee under Indentures securing debentures of ASSOCIATED GAS AND ELECTRIC CORPORATION, due 1973,

Petitioner,

vs.

DENIS J. DRISCOLL and WILLARD L. THORP, as Trustees of ASSOCIATED GAS AND ELECTRIC CORPORATION, Debtor.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE SECOND CIRCUIT AND BRIEF IN SUPPORT THEREOF.

JOSEPH GLASS,
Counsel for Petitioner.

LESLIE KIRSCH,
Of Counsel.

Pandick Press, Inc., 22 Thames St., New York 6, N. Y., U. S. A.

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Debtor.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE SECOND CIRCUIT.

To the Honorable Chief Justice and Associate Justices of the Supreme Court of the United States:

Petitioner respectfully prays that this Court issue a writ of certiorari to review, to the extent that it modified the decree of the District Court, a final decree, dated September 29, 1943, made by the United States Circuit Court of Appeals for the Second Circuit, hereinafter more fully described.

A.

Statement.

The following is a short statement of the matter involved which will also serve as a statement of the case for the purposes of the brief annexed to this petition.

Certain individuals conducted business as unincorporated associations under the assumed names of Transfer and Coupon Paying Agency (Traco) and Transfer and Paying Agency (Trapa) (R. 459-460). Under these assumed names, they maintained certain special accounts at certain New York banks (R. 462-463). During the years 1932-1939, Associated Gas and Electric Corporation (Agecorp) caused more than $141,000,000 of interest to be paid into and disbursed from these special accounts to holders of its debentures (R. 491, 486-487). The procedure was as follows.

At each accrual of interest during the years 1932-1939, Agecorp debited "Accrued Interest", credited "Special Deposits" and made the following typical journal record (R. 401, 484): "To record *liquidation** of 6 mos. interest due and payable 3/15/34 on our 3½'s of 1978 and 4's of 1973 * * *." Agecorp then prepared a voucher in "Favor of Transfer and Coupon Paying Agency—*Coupon Account*", or Traco's registered interest account as the case might be (R. 485). After January, 1937, these vouchers were drawn in "Favor of Transfer and Paying Agency *Coupon Account*" or Trapa's registered interest account as the case might be (R. 486). Each of these vouchers contained the "*Particulars*" of precisely calculated "*Funds needed to pay int. cpns.*" of specifically described debenture issues of Agecorp (R. 485).

Agecorp then in each case drew a check upon its *general* funds in an amount equal to the aggregate of the items described in each such voucher (R. 479, 486, 135-140). These checks were drawn to the order of and deposited in one of the Traco or Trapa *special accounts as such* (R. 479). Typical of the endorsements made on these checks was the

* Italics in all quotations herein are ours, unless otherwise indicated.

following (R. 479): "For deposit *only* to the account of Transfer and Coupon Paying Agency *Coupon Account.*"

Agecorp transmitted each of these checks to Traco or Trapa with letters of transmittal or memoranda describing the check as drawn to the order of the particular Traco or Trapa special account, together with a statement of its purpose, *e. g.: "To cover* Coupon Interest due December 1, 1939 on the following Associated Gas and Electric Corporation Debentures" (R. 480, 181). After these checks were deposited, the Traco or Trapa special account to the order of which they were drawn—not Traco or Trapa—drew and distributed checks for the payment of coupon and registered interest on Agecorp's debentures (R. 487).

On November 8, 1934, Agecorp sent Traco two letters (R. 482-483). The first concerned funds theretofore transmitted for the payment of interest as set forth above. Agecorp therein stated: "This is to advise you that any amount of such deposits remaining with you are to be held *in trust* by you for the holders of such securities to whom the interest is payable, for a period of *one year* from the date hereof." The second concerned funds therewith transmitted for the payment of interest as set forth above, and contained similar instructions.

Thereafter, until January, 1937, Agecorp continued to cause funds to be deposited in Traco's special accounts for the payment of interest as set forth above, accompanied by the book records, vouchers, checks and letters of transmittal described above. In January, 1937, the undisbursed balances in Traco's special accounts were taken over into the Trapa special accounts (R. 462, 191). Thereafter undisbursed and subsequently accrued interest on Agecorp's debentures was paid out of the Trapa special accounts (R. 463). The procedures described above remained unchanged

and continued except for the substitution of the Trapa special accounts for the Traco special accounts as the instrumentality of receipt, segregation and disbursement (R. 463).

After the letters of November 8, 1934, no part of the undisbursed balances in the Traco-Trapa special accounts was ever demanded or received by Agecorp (R. 491-492, 402). Agecorp continued in all respects to treat those undisbursed balances as beyond its control and as specifically appropriated for the particular purpose of paying interest on its debentures (R. 161, 594).

Agecorp's balance sheet treatment of these funds in the years 1932 to 1939 indicated its consistent intention and representation that the funds in question had been specifically appropriated for the purpose of paying interest on its debentures (R. 406-415). Similarly, detailed and *audited* adjustments between Agecorp and the Traco-Trapa special accounts pursuant to which deficiencies in or overpayments of interest were cured, indicated Agecorp's intent to relinquish control over the funds in question (R. 481, 293, 556).

Agecorp's accountant testified that these funds were appropriated for the particular purpose of paying interest on Agecorp's debentures and segregating them from Agecorp's general cash (R. 401, 161). Trapa's vice-president testified that Ageco paid Traco and Trapa for their services; that these payments were deposited in the *general* bank accounts of Traco and Trapa as such; and that Traco and Trapa as such never commingled their *general* funds with the funds in these special accounts for the payment of interest (R. 488-89, 159-160, 182). Agecorp maintained large accounts of its own *general* funds in the very same

banks in which the Traco and Trapa special accounts were maintained (R. 488).

In February, 1940, after Agecorp's Chapter X trustees had been appointed and after all payments of interest had ceased, the undisbursed balances in the Trapa special accounts were subjected to the tax lien of a jeopardy assessment filed by the Internal Revenue Department. To procure the release of the special accounts from the tax lien, Agecorp caused an *affidavit* to be filed with the Department of Internal Revenue (R. 489-90, 266-69). Agecorp's treasurer therein stated under oath that Trapa "has no rightful claim to any part of the said funds and does not make any such claim" (R. 269). He therein further stated that: "This affidavit is made in order that the notices of tax liens * * * may be vacated * * * *so that said funds may be available for the purposes for which they were originally deposited*" (R. 269).

Those "purposes" were the payment of interest on Agecorp's debentures. Those "purposes" could not have been the re-absorption of the funds by the Chapter X trustees of Agecorp which was then in bankruptcy. In reliance on that affidavit and a similar affidavit made by Trapa's treasurer (R. 258), the Collector of Internal Revenue released the funds from the tax lien of the jeopardy assessment because they were "*funds deposited by the corporations listed above with said taxpayer [Trapa] for the purpose of paying* their security holders interest and dividends when due" (R. 275, 276, 278, 279). The last release from the tax lien was made on February 17, 1941 (R. 276). On March 6, 1941, Trapa assigned these funds—the undisbursed balances in the special accounts which then aggregated $192,550.65—to Agecorp's Chapter X trustees

subject to determination of the outstanding claims of third parties (R. 503).

The Special Master reported that, for various reasons including the procedures described at pages 2-5, *supra*, these funds were affected by a *"trust status"* in favor of holders of Agecorp debentures for the payment of coupon and registered interest, and that they could not be reabsorbed by Agecorp's Chapter X trustees (R. 377-386; 400-422). The District Court confirmed the Special Master's report, but on narrower grounds (R. 593-595). The Circuit Court of Appeals modified the determination of the District Court. It held that the funds in the Traco special accounts had been affected by a one year trust under the letters of November 8, 1934; that such trust terminated after the expiration of one year; and that the funds received by Trapa from Agecorp, including the undisbursed balances transferred from the Traco special accounts into the Trapa special accounts, were not affected by a "trust" (R. 657-664).

At all its stages, the case was affected by confusion between the rigid requirements of an *inter vivos* trust proper and the trust *status* of a bailment arising from a specific appropriation of specifically described property to a specific purpose.

B.

The Questions Presented.

Did the Circuit Court of Appeals for the Second Circuit err in:

1. Failing to follow the law applicable to this case as set forth by the Supreme Court of the United

States in *McKee* v. *Lamon,* 159 U. S. 317, in terms of the principle that (p. 322): "The acceptance of the money *with notice of its ultimate destination* is sufficient to create a duty on the part of the *bailee to devote it to the purposes intended by the bailor*"?

2. Failing to follow the law applicable to this case as set forth by the Court of Appeals of New York in substantially the same terms in *People etc.* v. *The City Bank of Rochester,* 96 N. Y. 32, 36-37; *Shawmut Corp.* v. *Bobrick Sales Corp.,* 260 N. Y. 499, 504, *et seq.;* and *Sayer* v. *Wynkoop,* 248 N. Y. 54, 58, 59-60, 63?

3. Construing the letters of November 8, 1934 as creating trusts having a one year time limitation despite the fact that under New York law a trust for one year or any other definite period of time is illegal?

4. Holding that the transfer in 1937 of the undisbursed balances in the Traco special accounts to the Trapa special accounts—a mere change of bailee—affected the nature of the bailment with respect to those funds and funds thereafter transmitted to the Trapa special accounts?

5. Holding that Trapa was merely "a new paying agent", and failing to hold that the agency of Traco and then Trapa to pay on behalf of Agecorp was coupled with another agency, *i. e.,* an irrevocable bailment to Traco and then Trapa, as bailee, of the funds to be paid out on behalf of Agecorp, the bailor?

C.

Reasons Relied on for Granting the Writ.

1. The Second Circuit Court of Appeals has in this case decided important questions of New York law of bailment in probable conflict with the applicable decisions of this

Court and of the Court of Appeals of New York (*McKee* v. *Lamon*, 159 U. S. 317, 322; *People etc.* v. *The City Bank of Rochester*, 96 N. Y. 32, 36-37; *Shawmut Corp.* v. *Bobrick Sales Corp.*, 260 N. Y. 499, 504, *et seq.*; *Sayer* v. *Wynkoop*, 248 N. Y. 54, 58, 59-60, 63).

2. Unless this Court takes occasion to review an erroneous determination, as in this case, of important state law, the principle that state law should be followed in the federal jurisdiction (*Federal Judiciary Act of Sept. 24, 1789*, c. 20, §34, 28 U. S. C. A. §725) will be as much undermined by erroneous application of state law as it formerly was by federal departure from state law under the "doctrine of *Swift* v. *Tyson*" (*Erie R. Co.* v. *Tompkins*, 304 U. S. 69).

3. The law governing the disposition of funds deposited by foreign corporations, municipalities and states with agents in New York for the payment of interest on securities of such parties affects large sums, a great number of public investors throughout the nation, and is especially important in the City and State of New York where financial services of that nature are centered.

WHEREFORE, petitioner respectfully prays that a writ of certiorari be issued out of and under the seal of this Court, directed to the United States Circuit Court of Appeals for the Second Circuit in the case entitled "*In the Matter of Associated Gas and Electric Corporation, Debtor, Denis J. Driscoll, et al., etc., Appellants*, v. *Empire Trust Company et al., etc., Appellees*", No. 302, October Term, 1942, on the docket of said Court, to the end that the decree made by that Court, dated September 29, 1942, in so far as it modified the decree of the District Court in that case, may be reviewed and reversed by this Court, and that

petitioner may have such other and further relief in the premises as this Court may deem proper and just.

Dated, New York, N. Y., December 28, 1943.

EMPIRE TRUST COMPANY, as Trustee under Indentures securing debentures of Associated Gas and Electric Corporation, due 1973.

By JOSEPH GLASS,
Counsel for Petitioner.

BRIEF IN SUPPORT OF PETITION.

Opinions Below.

The opinion of the Circuit Court of Appeals for the Second Circuit is reported in 137 F. (2d) 603 (R. 657-664). The opinion of the United States District Court for the Southern District of New York, dated November 17, 1942, has not yet been officially reported (R. 554-596).

Jurisdiction.

The jurisdiction of this Court is invoked under §240(a) of the Judicial Code, as amended by the Act of February 13, 1925, c. 229, 43 Stat. 938, 28 U. S. C. A. §347(a); and §24c of the Bankruptcy Act, as amended by the Act of June 22, 1938, c. 575, 52 Stat. 854, 11 U. S. C. A. §47c.

The decree sought to be reviewed was made and filed on September 29, 1943 (R. 675-676).

Statutes Involved.

In connection with the applicable decisions of this Court and of the Court of Appeals declaring the law of New York in this type of case, the statute involved is the New York Personal Property Law, §11 (McKinney's Consolidated Laws of New York, Book 40, §11). The pertinent portion of that statute is as follows:

> "§11. Suspension of ownership
>
> The absolute ownership of personal property shall not be suspended by any limitation or condition, for a longer period than during the continuance and until the termination of not more than two lives in being at the date of the instrument containing such limitation or condition, or, if such instrument be a

last will and testament, for not more than two lives in being at the death of the testator; * * *"

Statement of the Case.

The essential facts have been stated under the heading "A" in the accompanying petition. In the interest of brevity they are not repeated here. Any necessary elaboration of those facts in connection with the points of law involved will be made in the course of the argument below.

Specification of Errors.

The Circuit Court of Appeals for the Second Circuit erred in that it:

1. Failed to follow the law applicable to this case as declared by this Court and the Court of Appeals of New York.

2. Construed the letters of November 8, 1934 as creating trusts having a one year time limitation contrary to the provisions of §11 of the Personal Property Law of New York.

3. Held that the transfer in 1937 of the undisbursed balances in the Traco special accounts to the Trapa special accounts affected the nature of the bailment with respect to those funds and funds thereafter transmitted to the Trapa special accounts.

4. Held that Trapa was merely "a new paying agent", and failed to hold that the agency of Traco and then Trapa to pay on behalf of Agecorp was coupled with another agency, *i.e.*, the irrevocable bailment to Traco and then Trapa, as bailee, of the funds to be paid out on behalf of Agecorp, the bailor.

5. The decree in question and every part thereof, in so far as it modified the decree of the District Court, is contrary to the facts and the law.

ARGUMENT

FIRST POINT

The decree in question conflicts with and should be reversed to conform to the applicable decisions of this Court and of the Court of Appeals of New York.

1. The *McKee* Case.

In *McKee* v. *Lamon*, 159 U. S. 317, this Court declared the New York law basic to this case. It held (p. 322):

> "There can be no doubt of the general proposition that where money is placed in the hands of one person to be delivered to another, a trust arises in favor of the latter, which he may enforce by bill in equity, if not by action at law. The acceptance of the money *with notice of its ultimate destination is sufficient to create a duty on the part of the bailee to devote it to the purposes intended by the bailor. Taylor* v. *Benham*, 5 How. 233, 274; *Kane* v. *Bloodgood*, 7 Johns. Ch. 90, 110; *Barings* v. *Dabney*, 19 Wall. 1; *National Bank* v. *Insurance Co.*, 104 U. S. 54; *Keller* v. *Ashford*, 133 U. S. 610; *Union Life Insurance Co.* v. *Hanford*, 143 U. S. 187; *Ryan* v. *Dox*, 34 N. Y. 307; *Story's Equity Jurisprudence*, §§1041, 1255; *Mechem on Agency*, §567."

To the same effect are the following cases in the Court of Appeals of New York involving factual situations indistinguishable from the facts in this case.

2. The *People* Case.

Thus, in *People etc.* v. *The City Bank of Rochester*, 96 N. Y. 32, a firm, which maintained an account with the Rochester bank, wished to pay certain notes payable at

that bank. It sent the bank a check drawn in the following unusual manner (p. 35):

> "$2,963.25 Rochester, N. Y., Nov. 3, 1882.
>
> The City Bank of Rochester,
>
> Pay to *our note due January 6, 1883*, or bearer, two thousand nine hundred and sixty three 25-100 dollars.
>
> Sartwell, Hough & Ford"

The similarity of said check to the checks drawn by Agecorp to the order of the Traco and Trapa special accounts, alone or in conjunction with the transmittal letters or memoranda which accompanied Agecorp's checks, is striking.

The Rochester bank charged said check to the account of said firm, and made an entry in its books to the effect that the note was "paid Nov. 3, 1882". The similarity of said entries on the bank's books to the entries which Agecorp made in its journal to record the "liquidation" of specifically calculated "Accrued Interest" on specifically described securities, alone or in conjunction with Agecorp's entries in its related vouchers, is also striking.

The bank sold the notes supposed to have been paid with the avails of said checks. It then became insolvent. Its receiver refused to pay the notes. The Court of Appeals affirmed a judgment against the receiver and held (pp. 36-37):

> "The transaction in question was *not* between the bank and Sartwell, Hough & Ford in their relation of debtor and creditor *nor* in their relation of bank and depositor. *The object of the latter was to provide a fund for the payment of specific notes, and the engagement of the former was to apply that fund to such payment. Thus a trust was created,* the vio-

lation of which constituted a fraud by which the bank could not profit, and to the benefit of which the receiver is not entitled. (*Libby* v. *Hopkins,* 104 U. S. 303; *In re LeBlanc,* 14 Hun, 8; affirmed, 75 N. Y. 598). *Those cases stand upon the ground of a specific appropriation of a particular fund for the payment of the claim there brought in question. So does the one at bar.* That fact is lacking in the case of *People* v. *Merchants and Mechanics' Bank* (78 N. Y. 269), on which the appellant relies; and this distinction is pointed out by the learned judge who delivered the opinion in that case. * * *

The checks of the petitioners were money assets in the hands of the bank and were so treated by all parties; they were delivered to it with *explicit directions* to apply the proceeds on payment of the notes: those directions were assented to by the bank officer, and the checks collected from the general fund. From that moment the bank was bound to hold the money for and apply it to that purpose, and no other, or failing to do so, return it to the petitioner. *As to it, the bank was bailee or trustee, but never owner. It is estopped from saying that all this is matter of book-keeping. It assumed a duty, and the receiver as its representative is bound by it.* Nor does this obligation at all depend, as the appellant seems to suppose, upon the question, when, where and to whom the notes were to be paid; whether presently or in the future is immaterial.

The specific object for which the fund was created was the payment of the notes, and its character does *not* depend upon those incidental circumstances. *The checks were impressed with a trust,* and no change of them into any other shape could divest it so as to give the bank or its receiver any different or more valid claim in respect to them than the bank had before the conversion. (*Van Alen* v. *Am. Nat. Bank,* 52 N. Y. 1; *Dows* v. *Kidder,* 84 *id.* 121.)"

3. The *Shawmut* Case.

Shawmut Corp. v. *Bobrick Sales Corp.*, 260 N. Y. 499, is also closely in point. Schild & Co. had a general balance in the Bank of United States. It directed the bank to debit its account with the amount of a draft drawn by Bobrick and accepted by the bank. The bank did so, by debiting Schild's general account for $4,200 and crediting Schild with that sum in an account entitled "Prepaid Acceptances". The bank then notified Schild that its account had been charged for "acceptance due re-L/C #8853". Here, too, the similarity of said entries on the bank's books to the entries which Agecorp made in its journal, debiting "Accrued Interest"—"liquidation" of which was specifically noted—and crediting "Special Deposits", is striking.

Bobrick sold the draft to Shawmut. The liquidator of the Bank of United States refused to pay the draft. The Court of Appeals affirmed a judgment against the liquidator and held (260 N. Y. 499, 505):

> "* * * *Short of a physical segregation of so much cash, it is difficult to see what more could have been done to put a specific sum of $4,200 into an identified fund.* The facts are in no essential respect different from those in *People* v. *City Bank of Rochester* (96 N. Y. 32). The same result must follow. By a transaction outside of the terms of the letter of credit agreement, Schild & Co. provided a fund for the payment of the draft. The Bank set it aside and engaged to apply it for that purpose. *'As to it, the bank was bailee or trustee.'* (*People* v. *City Bank of Rochester, supra*, p. 37.)
>
> The judgment should be affirmed, with costs."

4. The *Sayer* Case.

In *Sayer* v. *Wynkoop*, 248 N. Y. 54, the Court of Appeals applied this Court's decision in the *McKee* case to a factual situation indistinguishable from the facts in this case. Wynkoop conducted an insurance brokerage business under the name of "Wynkoop Service". A check was sent him to the order of Wynkoop Company for the purpose of transmission by him for the remitter's account to the state insurance fund. The check disclosed on its face that it was drawn on account of "Earned Premium, Policy of State Fund No. 22878-B, subject to final checking." The remitter became bankrupt.

Thereafter, the remitter's receivers transmitted five checks for the same purpose drawn to the order of "Wynkoop Company" or "Wynkoop Service". The first bore on its face the statement "Acct. Compensation Insurance Accd. Comp. Ins."; the second, the statement "a/c Compensation Insurance"; the third, the statement "On account of indebtedness to State Insurance Fund to November 19, 1917"; the fifth, the statement "Premium on account State Insurance Fund". On the reverse side of each check, appeared the following: "Received * * * the amount shown on face of this voucher in full of account as stated thereon." Here, too, the similarity of those notations describing the purpose of the checks, to Agecorp's journal records, transmittal letters and memoranda describing the purpose of its checks, is striking.

Wynkoop endorsed each of those six checks in the name of "Wynkoop Company" or "Wynkoop Service", deposited them, and appropriated the avails thereof. Sayer, the insurance commissioner, sued Wynkoop for the funds on the grounds that they were fixed with a trust status. The Court of Appeals affirmed a judgment in his favor and held (248 N. Y. 54, 59-60):

"In all these cases permitting a recovery by the third person there appears to have been an express promise on the part of the person receiving the moneys to pay them over, or an acknowledgment by him that the moneys were received to be held in trust for such third person. *However, it is apparent that the intention of the owner, and not that of the receiver, is controlling upon the question whether title to the moneys has been transferred and a trust has been created.* True, there must be an assumption of the trust duty by the receiver, but that may arise through implication as well as through expression. *No particular form of words is required either to create the trust or to indicate that a trust duty has been assumed.* 'To constitute a trust there must be either an explicit declaration of trust, or circumstances which show beyond reasonable doubt that a trust was intended to be created.' (ANDREWS, J., in *Beaver* v. *Beaver*, 117 N. Y. 421, at p. 428.) '*Of course particular words, and least of all the specific word "trust", are not necessary to create a trust.*' (HISCOCK, J., in *Title Guarantee & Trust Co.* v. *Haven*, 214 N. Y. 468, at p. 481.) In *McKee* v. *Lamon* (159 U. S. 317, at p. 322) the court said: 'There can be no doubt of the general proposition that where money is placed in the hands of one person to be delivered to another, a trust arises in favor of the latter) which he may enforce by bill in equity, if not by action at law. *The acceptance of the money with notice of its ultimate destination is sufficient to create a duty on the part of the bailee to devote it to the purposes intended by the bailor.*' "

Further on the Court of Appeals held (pp. 63 *et seq.*):

"In reference to the payment of $2,926.60, made by the Metropolitan By-Products Company, Inc., to the defendant under the name of the Wynkoop Company, less is known concerning the intention of the drawer and payee of the check than has been dis-

closed in reference to the payments made by the checks of the receivers. However, it appears upon the face of the check that it was drawn on account of 'Earned Premium, Policy of State Fund No. 22878-B, subject to final checking.' The same statement appears upon the face of the check, as to the receipt which is required to be signed, as appeared upon each of the receivers' checks. Likewise, a similar receipt appears upon the back of the check. We think that sufficient is disclosed to indicate that the drawer of the check intended to transfer irrevocable title to the moneys drawn, and that the payee, the defendant, intended to receive the moneys as trustee or agent for the State Insurance Fund.

On the whole case, therefore, we think the State, in this action for money had and received, was entitled to recover the sums paid to the defendant, and the judgment should be affirmed, with costs."

The facts of this case outlined under the heading "A" of the accompanying petition are strikingly similiar to those in, and are governed by the principles of law set forth in, the *People, Shawmut* and *Sayer* cases. They irresistibly lead to the conclusion that the $192,550.65, undisbursed balance in the Trapa special accounts was part of the funds specifically segregated and appropriated for the purpose of paying interest on Agecorp's debentures. It follows that said balance is fixed with the trust status of an irrevocable bailment for the payment of that interest and that the Circuit Court of Appeals for the Second Circuit erred in holding to the contrary.

SECOND POINT

The Circuit Court erred in construing the letters of November 8, 1934 as creating a trust having a one year time limitation. Such a construction is contrary to the provisions of §11 of the Personal Property Law of New York and the applicable decisions of the Courts of that State.

The Circuit Court's opinion of modification or reversal as to the undisbursed balance in the Trapa special accounts turns upon the effect, as a matter of law, of the so-called *one year* trust letters (R. 663, *et seq.*). The Circuit Court held:

> "* * * But the fact that no demand was made for the return of undisbursed funds is as consistent with the theory *that they were general assets of the Corporation on deposit with its paying agent* as with the view that failure to withdraw them—evidenced an intention to have the trusts continue beyond the expiration of *one year.* * * * Such transfer [from Traco to Trapa] with the Corporation's consent would seem to evidence *a withdrawal by the Corporation of the undisbursed funds* rather than the appointment of a new trustee of them, for the November letters reserved no power to the Corporation or to Traco to appoint a new trustee." (Interpolation in brackets ours.)

It is well established in New York law that a trust for any definite number of years is invalid, in so far as the time limitation is concerned. Where, as here, the purpose of the trust can be effectuated without such invalid trust term, the invalid part is deleted and the trust is performed without it. Thus, in *Matter of Stulman,* 146 Misc. (N. Y.) 861, it was held (p. 867):

> "The limitation of three years on the time of payment is, however, invalid, since it effects a restraint on alienation *for a period measured other than by lives in being at the death of the testator.* (Real Prop. Law, §42; Pers. Prop. Law, §11.) This does not, however, invalidate the entire bequest, *since the illegal direction will be deleted* (*Matter of Hitchcock,* 222 N. Y. 57, 73), with the result that the gifts in question will stand on the same basis as general legacies in respect to which *no limitation is inserted.* While this result may, as suggested, be effected by the application of the principle of acceleration (*Matter of Terwilligar,* 135 Misc. 170, 184; affd., 230 App. Div. 763), such process is really unnecessary, *since by the excision of the ineffectual limitation the direction is valid as it stands.* (*Matter of Terwilligar, supra,* 181, 182; *Matter of Enright,* 139 *Misc.* 192, 199; *Matter of Meyer,* 140 *id.* 1, 5; *Matter of Knoll,* 146 *id.* 613.)"

As appears from *Matter of Hitchcock,* 222 N. Y. 57, 73, and the other cases cited in the above quotation, the rule is applicable to trusts as well as legacies.

Moreover, the transfer of the undisbursed balances in the Traco special accounts to the Trapa special accounts did not destroy the nature of the irrevocable bailment. That transfer involved merely a substitution of bailee. In the *People* case, *supra,* the Court of Appeals stated (96 N. Y. 32, 37):

> "The checks were impressed with a trust, and *no change of them into any other shape* could divest it so as to give the bank or its receiver any different or more valid claim with respect to them than the bank had before the conversion [citing cases]."

It remains but to add that, if the transfer of the undisbursed balances in the Traco special accounts to the Trapa

special accounts be viewed as the mere substitution of one bailee for another to hold and carry out the terms of an irrevocable bailment, this case need not be considered in terms of *inter vivos* trusts at all. The error of the Circuit Court described in this point resulted from its disposition of this case in terms of *inter vivos* trust concepts, rather than in terms of the applicable law of bailment.

THIRD POINT.

The Circuit Court of Appeals erred in failing to hold that the paying agency in this case was coupled with another agency, *i. e.*, that of an irrevocable bailment.

The Circuit Court approached and determined this case as though it were one involving a general deposit with a bank which was to act as a paying agent (R. 661). *Nacional Financiera S. A.* v. *Speyer*, 261 App. Div. 599, cited and relied upon by the Circuit Court of Appeals, is the most recent and typical of that class of cases which, for convenience, may be designated as the bank-depositor cases. The Circuit Court's approach to this case in terms of the bank-depositor cases appears to have been erroneous in two respects.

The essence of all the bank-depositor cases is the existence of a debtor-creditor relationship. In such cases, the depositor is *at all times* free to withdraw the amount deposited. Such right of withdrawal precludes the possibility of, or is inconsistent with, an *irrevocable* bailment of the fund deposited even though the bank has been instructed to pay the deposit out in the form of interest on the depositor's securities.

But there was no debtor-creditor relationship between Agecorp on the one hand, and Traco or Trapa on the other. In 1940, in order to procure the release of the undisbursed funds in the Trapa special accounts from the tax lien of a jeopardy assessment levied thereon by the Internal Revenue Department, Agecorp's treasurer stated under oath that (R. 269):

> "* * * Such funds were not paid to Transfer and Paying Agency for its own use and were not commingled with its general funds. Transfer and Paying Agency has no rightful claim to any part of the said funds and does not make any such claim. * * *
>
> "This affidavit is made in order that the notices of tax liens heretofore served * * * may be vacated * * * *so that said funds may be available for the purposes for which they were originally deposited.*"

Trapa's treasurer filed an affidavit to the same effect and for the same purpose (R. 255, 258).

If there had been a debtor-creditor relationship between Agecorp and Trapa, Trapa's debt to Agecorp in the amounts deposited in the Trapa special accounts would have been distinguishable from Trapa's ownership of those special accounts. In that event, the funds in the special accounts would have been property of Trapa subject to the lien of the jeopardy assessment against Trapa. However, the Internal Revenue Department released that lien because the funds in the special accounts were *not* property of Trapa.

Only two other possibilities remain. Either the paying agency was coupled with a fiduciary obligation on the part of Trapa, as agent, to return those funds to Agecorp, as principal; or those funds were held by Trapa, as bailee, under an irrevocable bailment to pay interest there-

from to the holders of Agecorp's debentures. It adds nothing to the analysis of this case to describe the relationship of Trapa to Agecorp as that of "paying agent." If the description stops short at that point, the nature of the *other* agency, with which that agency was coupled, remains undetermined. In such a case—and that is this case—we must ascertain, in terms of one or the other of the two possibilities described above, the nature of the agency with which the paying agency is coupled. Thus, in *Sayer* v. *Wynkoop*, 248 N. Y. 54, the Court of Appeals noted and described the two two-fold relationship inherent in this type of case as follows (p. 58):

> "* * * Again, the owner may deposit the moneys with a banker with instructions to apply them in satisfaction of the debt of a third person. In that event, the conventional relationship of debtor and creditor between the banker and the depositor is created, *coupled with an agency* on the part of the banker to pay the debt, which is revocable at the will of the depositor. (*Aetna National Bank* v. *Fourth National Bank*, 46 N. Y. 82; *Erb* v. *Banco di Napoli*, 243 N. Y. 45.) *Where, however, the owner delivers the moneys to another upon an agreement that they will be paid to a third person, such third person acquires an equitable interest entitling him to have a recovery in an action for money had and received.*" (Citing cases.)

If the paying agency is not coupled with a debtor-creditor relationship terminable at will, as in the bank-depositor cases from which this case is distinguishable, but is coupled with an agreement that the funds in question shall be paid to third parties, an irrevocable bailment results. The Special Master found this distinction unanswerable (R. 416-418). The Circuit Court of Appeals, without rejecting the distinction, erroneously determined this case in terms of the

concept of a bank acting as paying agent of a depositor who could terminate the agency at will by withdrawing his deposit.

Conclusion.

If the above described errors of law were corrected, this case would take on an altogether different complexion. In that event, the 1934 trust letters and the 1940 jeopardy assessment affidavits which confirm Agecorp's intent to create an irrevocable bailment—alone or in conjunction with the evidence as to the form of Agecorp's book records, checks, letters of transmittal, memoranda, audited accountings and adjustments with Traco and Trapa concerning the funds transmitted, Agecorp's balance sheet declarations, and the testimony as to the exclusive appropriation of the funds—would take this case out of the area in which any Court could feel free to draw the inference that the proven facts are as consistent with holding that the funds in the Trapa special accounts were not intended to be affected by an irrevocable bailment, as they are with the contrary conclusion found below in the opinion and report of the District Court and the Special Master.

Accordingly, for the reasons presented in the foregoing petition and brief, the writ of certiorari prayed for should be granted in order that this Court may review the decision in question and reverse it.

Dated, New York, N. Y., December 28, 1943.

Respectfully submitted,

JOSEPH GLASS,
Counsel for Petitioner.

LESLIE KIRSCH,
Of Counsel.

(16)

Office - Supreme Court, U. S.
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CHARLES ELMORE CROPLEY
CLERK

IN THE

Supreme Court of the United States

OCTOBER TERM, 1943

No. 563

EMPIRE TRUST COMPANY, as Trustee under Indentures securing debentures of ASSOCIATED GAS AND ELECTRIC CORPORATION, due 1973,

Petitioner,

vs.

DENIS J. DRISCOLL and WILLARD L. THORP, as Trustees of ASSOCIATED GAS AND ELECTRIC CORPORATION, Debtor.

ON PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE SECOND CIRCUIT

BRIEF FOR THE RESPONDENTS IN OPPOSITION

ALLEN E. THROOP,
Attorney for Denis J. Driscoll and Willard L. Thorp, Trustees of Associated Gas and Electric Corporation, Debtor, Respondents.

E. ROBERT WILLCOX,
FELIX TAUBENBLATT,
Of Counsel.

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IN THE

Supreme Court of the United States,

OCTOBER TERM, 1943

No. 563

EMPIRE TRUST COMPANY, as Trustee under Indentures securing debentures of ASSOCIATED GAS AND ELECTRIC CORPORATION, due 1973,

Petitioner,

vs.

DENIS J. DRISCOLL and WILLARD L. THORP, as Trustees of ASSOCIATED GAS AND ELECTRIC CORPORATION, Debtor.

ON PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE SECOND CIRCUIT

BRIEF FOR THE RESPONDENTS IN OPPOSITION

Opinions Below

The opinion of the United States Circuit Court of Appeals for the Second Circuit (R. 657-664) is reported in 137 F. (2d) 603. The opinion of the United States District Court for the Southern District of New York (R. 554-596) is not reported.

Jurisdiction

The jurisdiction of this Court is invoked by petitioner under § 240(a) of the Judicial Code, 28 U. S. C. A. 347(a), and § 24c of the Bankruptcy Act, 11 U. S. C. A. § 47c. The judgment of the Circuit Court was dated September 29, 1943. The petition for a writ of certiorari was filed on December 29, 1943.

Statement

In 1933 Associated Gas and Electric Corporation (herein called the Corporation) created two issues of unsecured debentures. Interest on the debentures was payable semi-annually at the office or agency of the Corporation in New York City. From 1933 until the filing on January 10, 1940 of the Corporation's petition for reorganization under Chapter X of the Bankruptcy Act, funds for the payment of each installment of interest were deposited by the Corporation with its paying agent a few days in advance of the date upon which such installment became due. Prior to 1937, all such deposits were made with the Corporation's paying agent, Transfer and Coupon Paying Agency (a New Jersey business trust, herein for brevity called Traco).

On November 8, 1934, the following instructions were lodged with, and accepted by, Traco (R. 314):

"ASSOCIATED GAS AND ELECTRIC SYSTEM
Principal Office
Ithaca, New York

NOVEMBER 8, 1934.

Please address reply to
Room 2401, 61 Broadway
New York.

TRANSFER AND COUPON PAYING AGENCY,
30 West Blackwell Street,
Dover, N. J.

Gentlemen:

We have heretofore from time to time deposited with you, as paying agent, funds for the payment of interest on securities of this Company.

This is to advise you that any amount of such deposits remaining with you are to be held in trust by you for the holders of such securities to whom the interest is payable, for a period of one year from the date hereof.

Will you please indicate in the space provided below your acceptance of these instructions.

Very truly yours,

ASSOCIATED GAS AND ELECTRIC CORPORATION
By J. LEE RICE, JR.,
Treasurer.

The undersigned agrees that the funds referred to above will be held in trust by it in accordance with the above instructions.

TRANSFER AND COUPON PAYING AGENCY,
By R. N. THOMPSON,
Vice-President."

On the same day, November 8, 1934, the Corporation deposited with Traco $1,071,069.74 and the following in-

structions were lodged with, and accepted by, Traco (R. 315):

"ASSOCIATED GAS & ELECTRIC SYSTEM
Principal Office
Ithaca, New York.

NOVEMBER 8, 1934.

Please address reply to
Room 2401, 61 Broadway,
New York.

TRANSFER AND COUPON PAYING AGENCY,
30 West Blackwell Street,
Dover, N. J.

Gentlemen:

We hand you herewith checks to your order totalling $1,071,069.74. These checks are delivered to you to pay interest adjustments under the Plan of Rearrangement of Capitalization of Associated Gas and Electric Company due November 15, 1934 in the amount of $4,476.56, and interest due December 1, 1934 on the 4½% and 5% Debentures, due 1973, of this Corporation in the amount of $1,066,593.18.

These funds are deposited with you to be held in trust by you for the holders of our debentures to whom the interest is payable and are to be held in such trust for the period of one year from December 1, 1934.

Kindly acknowledge the receipt of these funds in the space provided at the bottom of this letter.

Very truly yours,

ASSOCIATED GAS AND ELECTRIC CORPORATION,
By J. LEE RICE, JR.,
Treasurer.

Receipt of the above remittance is acknowledged. It will be held in trust by the undersigned as provided above.

TRANSFER AND COUPON PAYING AGENCY,
By R. N. THOMPSON,
Vice-President."

In January 1937 *all* funds held by Traco for the payment of unclaimed interest were withdrawn from Traco and deposited with the Corporation's new paying agent, Transfer and Paying Agency (another New Jersey business trust, herein for brevity called Trapa). Funds for the payment of subsequent installments of interest were deposited with Trapa.[1]

Until the filing by the Corporation of its petition for reorganization checks for the payment of registered interest were issued by the Corporation's paying agent and paid upon presentment. All coupons were either paid by the paying agent upon presentment or checks therefor issued that were paid upon presentment.

On January 10, 1940, the date of filing of the petition for reorganization, coupons and checks that had not been presented for payment aggregated $192,550.65 and funds in that amount were on deposit with Trapa. At that time Trapa also had on deposit funds held by it as paying agent for other corporations. No interest on securities of the Corporation was paid by Trapa after January 10, 1940. On

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[1] Petitioner states on page 2 of its petition that the Corporation during the years 1932-1939 caused more than $141,000,000 of interest to be paid into and disbursed from these "special accounts" to holders of its debentures. The statement is incorrect. The years referred to should have been 1935 to 1940 (R. 195). The figure of $141,000,000 includes funds disbursed from the same accounts for the payment of interest on debentures of a number of other corporations for which Trapa was paying agent (R. 195, 254-269). Petitioner uses the term "special account" 36 times in its petition and brief but such term does not appear in any indenture, agreement, transmittal letter, intra-corporate memorandum, journal entry, ledger or other record. The only appearance of the term is in affidavits (R. 254-269) filed by the treasurer of the Corporation and the treasurer of Trapa with the Bureau of Internal Revenue in order to obtain certificates of non-attachment pursuant to which funds held by Trapa were returned to the corporations from which Trapa had received them.

February 5, 1940, Trapa ceased its paying agency business, and subsequently all funds that were on deposit for the payment of interest were returned to the corporations that had deposited them, said $192,550.65 and certain other funds not here involved being assigned to respondents herein as reorganization trustees of the Corporation subject to such rights, if any, as the holders of outstanding coupons and checks might be determined to have (R. 122, 238-248). Respondents filed a petition in the reorganization proceedings to determine the status of various funds, including the funds here involved.

The District Court made the following finding of fact (R. 619-620):

> "3. Prior to November 8, 1934 Transfer and Coupon Paying Agency was only a paying agent and none of the funds deposited with Transfer and Coupon Paying Agency were intended to be held or were held in trust for holders of coupons or interest checks issued with respect to the Debtor's Income Debentures or Convertible Debentures and no part of the undisbursed funds held by Transfer and Coupon Paying Agency was ever demanded or received by the Debtor. Nothing in the relationship between the Debtor and Transfer and Coupon Paying Agency occurred to change definitely that relationship until November 8, 1934, when the Debtor sent to Transfer and Coupon Paying Agency the letters, dated November 8, 1934, of the Debtor (Tr. Ex. AA-1 and 2).[2] Transfer and Coupon Paying Agency accepted the trust conditions specified in said letters. The Debtor's intention that the accumulating funds should be held by Transfer and Coupon Paying Agency as trust funds was formed and expressed on November 8, 1934, and continued from that date to January 10, 1940. After November 8, 1934, the Debtor forwarded to Transfer and Coupon Paying Agency, and after January 1937 to Transfer and Paying Agency, further sums to meet the interest as it accrued on the Debtor's securities in coupon and registered form,

[2] These are the letters printed at pages 3 and 4 of this brief.

> and no part of the undisbursed funds held by Transfer and Coupon Paying Agency or Transfer and Paying Agency was ever demanded or received by the Debtor. Prior to November 8, 1934, during the one year periods specified in said November 8, 1934 letters, and after the expiration of said one year periods the Debtor in all respects treated said funds as beyond the control of the Debtor, and the treatment by the Debtor of said funds, which was the same treatment as that accorded said funds prior to November 8, 1934, was in all respects consistent with the holding by Transfer and Coupon Paying Agency and Transfer and Paying Agency of said funds under a continuing trust."

The reorganization trustees of the Corporation, respondents herein, appealed, contending that the finding that a trust continued from November 8, 1934 to January 10, 1940 was not justified by the evidence. The Circuit Court of Appeals per Swan, C. J. stated "We think this contention is sound" (R. 662).

Question Presented

The Circuit Court of Appeals decided that circumstances did not show that a trust was intended to be created of funds deposited with the Corporation's paying agent for the payment of interest on unsecured debentures, and hence, that such funds constituted general assets of the Corporation's estate and not trust funds for debenture holders who had failed to claim their interest prior to the institution of proceedings for the reorganization of the Corporation.

The question presented is whether the decision that no trust existed was a determination of an important question of local law in probable conflict with applicable local decisions.[3]

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[3] Rules of the Supreme Court, Rule 38, Subdivision 5(b).

ARGUMENT

POINT I

The decision of the Circuit Court of Appeals is not in conflict with applicable local decisions.

Petitioner's First Point is that the decree conflicts with applicable decisions of this Court and of the New York Court of Appeals. Four cases are cited, *McKee* v. *Lamon*, 159 U. S. 317 (1895), *People* v. *The City Bank of Rochester*, 96 N. Y. 32 (1884), *Shawmut Corp.* v. *Bobrick Sales Corp.*, 260 N. Y. 499 (1933) and *Sayer* v. *Wynkoop*, 248 N. Y. 54 (1928).

In the *McKee* case the fact that a trust existed was not in issue. The only question presented was whether Lamon was a beneficiary. The settlor of the trust was not a party to the action.

The *People*, *Shawmut* and *Sayer* cases involve, petitioner asserts, "factual situations indistinguishable from the facts in this case". None of these cases involved paying agencies or interest payments. None deals even remotely with circumstances like those presented herein nor was any of them decided against the depositor.

What rule of law enunciated in these cases is being relied upon is not clear. If petitioner is asserting that these cases hold that funds deposited with a paying agent for payment to others may not be returned to the depositor, the *People* case is to the contrary as it squarely holds that:

> "The bank was bound to hold the money for and apply it to that purpose, and no other, or failing to do so, return it to the petitioner."

In *Matter of Arcadia Trust Company*, 240 App. Div. 166, 168 (4th Dept., 1934), the Appellate Division cited the

People case and the *Shawmut* case in support of its ruling that funds deposited for "the sole and specific purpose of paying coupons about to become due on the bonds and by their terms payable at the office of the trust company" remain the property of the depositor. In the case of *In re Kountze Bros.*, 103 F. (2d) 785 (2 Cir., 1939), cert. den. sub nom. *Los Angeles* v. *Irving Trust Co.*, 308 U. S. 586 (1939), dealing with funds deposited with a paying agent, the *People* and *Shawmut* cases were expressly distinguished, the Court stating (at page 789):

> "In those cases which we consider controlling it is held that no trust is created for the benefit of coupon holders merely by reason of a deposit for the special purpose of paying interest on bonds. *Staten Island Cricket & Baseball Club* v. *Farmers Loan & Trust Co.*, 41 App. Div. 321 (2d Dept., 1899); *Noyes* v. *First National Bank of New York*, 180 App. Div., 162 (1st Dept., 1917), affirmed 224 N. Y., 542; *Erb* v. *Banco di Napoli*, 243 N. Y. 45 (1926)."

In the *Sayer* case, an action was brought on behalf of the State Insurance Fund against Wynkoop to recover money that Metropolitan By-Products Company had deposited with Wynkoop for payment of premiums on certain Workmen Compensation insurance issued to the By-Products Company. The depositor was not a party to the action. The New York Court of Appeals held that Wynkoop was the "trustee or agent for the [creditor] State Insurance Fund" and not the agent of the depositor.

The local decisions cited by petitioner do not hold that a bailee should not return to his bailor money not applied for the purpose for which it was deposited. In so far as petitioner's cases are applicable at all they hold that undisbursed money must be returned by a bailee to his bailor-principal.

Petitioner's Second Point is that a trust for one year is contrary to the provisions of § 11 of the New York Per-

sonal Property Law[4]; that the Circuit Court of Appeals held funds here involved to have been impressed with a trust for one year; and that such holding is accordingly in conflict with applicable local decisions. Under the New York Personal Property Law the absolute ownership of personal property must not be suspended for a term of years. There has been in this case no suspension of absolute ownership of any personal property because there has been no restriction against payment of the funds. The Corporation's paying agent was instructed to pay interest as it became due and was claimed. In *Walsh* on *Future Estates in New York*, § 28, page 167, the law of New York is succinctly stated as follows:

> "If the trustee is expressly given the power to convey and distribute the proceeds at any time, thereby ending the trust, there is no suspension of alienation and the trust is good, no matter how many lives are involved."

In the instant case during the one year periods that the paying agent acted as trustee, it was not only given the power to convey and distribute, it was expressly directed to make such conveyance and distribution.

Even if the one year trusts were invalid, as contended by petitioner, the decision of the Circuit Court of Appeals would be correct in result, for it would follow that the settlor or his representatives (respondents herein) could reclaim the funds from the "trustee". Petitioner attempts to escape this result by urging that the one year limitation

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[4] This section is found in 40 McKinney's Consolidated Laws of New York, Annotated, Personal Property Law, § 11. So far as pertinent here, it reads as follows: "Suspension of ownership. The absolute ownership of personal property shall not be suspended by any limitation or condition, for a longer period than during the continuance and until the determination of not more than two lives in being at the date of the instrument containing such limitation or condition * * *."

on the trust be stricken out. In other words, it requests this Court to establish a trust forever, on the ground that a trust for one year is too long.

In its Third Point petitioner avoids employing the language of trusts and asserts that the funds in question were subject to an "irrevocable bailment". Petitioner's argument is that

> "If the paying agency is not coupled with a debtor-creditor relationship terminable at will, as in the bank-depositor cases from which this case is distinguishable, but is coupled with an agreement that the funds in question shall be paid to third parties, an irrevocable bailment results."

How petitioner arrives at the strange conclusion that funds transmitted to an agent for disbursement leave the control of the depositor, while funds transmitted to a bank for that purpose do not, does not appear. Petitioner's quotation from *Sayer* v. *Wynkoop*, 248 N. Y. 54, 58 (1928) sheds no light on the matter. In that case the Court of Appeals held that it is the intention of the owner and not that of the receiver that is controlling upon the question whether title to property has been transferred and a trust created. The Court of Appeals found the decisive factor in the *Sayer* case to be that the depositor parted with control of his funds when he delivered them, not to his own agent, but to the agent of the State Insurance Fund to which he owed the money. In the instant case neither Traco nor Trapa promised the debenture holders that it would act for them.

It is submitted that the Circuit Court of Appeals was correct in determining that the evidence did not justify holding that the depositor intended to part with control of the funds in question. There is no support in the Record or in the authorities for petitioner's argument that such funds were the subject of an "irrevocable bailment".

POINT II

The question decided by the Circuit Court of Appeals is a question of fact and therefore not of such character as to warrant review by this Court.

A. THE QUESTION DECIDED IS A QUESTION OF FACT. In order for the funds involved in this case to constitute trust funds for a special class of creditors the Corporation must have formed and expressed an intention that such funds were to be held in trust. The intention of the depositor is controlling. Both the District Court and the Circuit Court of Appeals state this to be the law of New York, and petitioner does not challenge that such is the law of New York. It is a question of fact whether there was any such intention. No promise, representation or suggestion that the Corporation had created or would create a trust for the payment of interest is contained in any of the Corporation's indentures, debentures, coupons, checks, bookkeeping records, vouchers, transmittal letters or memoranda. If a trust is to be deemed to exist it must be inferred from circumstances, as distinct from an express trust. In *Beaver* v. *Beaver*, 117 N. Y. 421, 428 (1889), Judge Andrews of the New York Court of Appeals stated that if a trust is to be inferred from circumstances, the circumstances must be such as will "show beyond a reasonable doubt that a trust was intended to be created." Judge Andrews continues:

> "It would introduce a dangerous instability of titles, if anything less was required or if a voluntary trust *inter vivos* could be established in the absence of express words, by circumstances capable of another construction, or consistent with a different intention."

Petitioner asserts (page 12 of its petition) that the Circuit Court of Appeals erred in that it heid that the transfer in 1937 from the old paying agent to the new affected the nature of the bailment with respect to those

funds and funds thereafter transmitted. The Circuit Court's holding is that the transfer is additional evidence of the Corporation's intent not to continue a trust of the interest moneys after the one year periods. The District Court inferred that the Corporation intended to impress a trust upon the funds deposited with Trapa. The Circuit Court of Appeals held:

> "That the Corporation intended to impress a trust upon the funds deposited with Trapa can be but an inference drawn from the proven facts. And it is one which need not necessarily be drawn, for the facts are at least equally consistent with an intention on the Corporation's part to make Trapa merely its paying agent."

B. A DECISION INVOLVING MERELY A DETERMINATION OF A FACTUAL ISSUE DOES NOT WARRANT REVIEW BY WRIT OF CERTIORARI. There is no general principle or question of law involved in the decision of the Circuit Court of Appeals. The present petition therefore falls squarely within the rule announced by this Court in *General Talking Pictures Corp.* v. *Western Electric Co.*, 304 U. S. 175, 178 (1938):

> "Granting of the writ would not be warranted merely to review the evidence or inferences drawn from it."

In *Southern Power Company* v. *North Carolina Public Service Company*, 263 U. S. 508, 509 (1924) this Court said:

> "The argument developed that the controverted question was whether the evidence sufficed to establish actual dedication of petitioner's property to public use—primarily a question of fact. That is not the ground upon which we granted the petition and if sufficiently developed would not have moved us thereto."

In *United States* v. *Johnston*, 268 U. S. 220, 227 (1925) this Court said:

> "We do not grant a certiorari to review evidence and discuss specific facts."

Conclusion

The decision of the Circuit Court is correct. It is not in conflict with the law of New York. Furthermore, the decision is a determination of a question of fact and is applicable only to particular circumstances. Respondents therefore respectfully request that the petition for a writ of certiorari be denied.

Dated: January 19, 1944.

Respectfully submitted,

ALLEN E. THROOP,
Attorney for Denis J. Driscoll and Willard L. Thorp, Trustees of Associated Gas and Electric Corporation, Debtor, Respondents.

E. ROBERT WILLCOX,
FELIX TAUBENBLATT,
Of Counsel.